Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-308

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ADAM G. NUNEZ,
Appellant

v.

WAINOCO OIL & GAS COMPANY, et al.,
Appellees

On Appeal From the Louisiana Supreme Court

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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October 10, 1986

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QUESTIONS PRESENTED

The questions presented for this Court's review in this Motion of Appellees to Dismiss or Affirm are as follows:

I. Whether the appeal in the instant case satisfies the prerequisites set forth for jurisdiction in 28 U.S.C. §1257 and the grounds for consideration provided in Rule 16 of the Supreme Court Rules; and

II. Whether the judgment of the Supreme Court of Louisiana holding that unitization under the Louisiana Conservation Act supersedes in part certain property law concepts, such as trespass, in the interest of conserving the natural resources of the State and of protecting private property interests, or correlative rights, of non-drilling landowners is clearly correct so as not to warrant review by this Court.

PARTIES TO PROCEEDINGS BELOW

In compliance with Rule 28 of the Supreme Court Rules, Appellees offer the following listing naming all parent companies, subsidiaries and affiliates of each corporation which is a party to this proceeding.

Wainoco Oil & Gas Company:

Parent Company: Wainoco Oil & Gas Company

Subsidiaries: Wainoco Oil & Gas Company, Wainoco Oil & Gas Limited, Wainoco Resources, Inc., Wainoco Australia, Inc., Wainoco International, Inc., Wainoco Energy Corporation, and Wainoco Indonesia, Inc.

Tidewater Realty, Inc. and Tidewater Barges, Inc.:

Parent Company: Tidewater Inc.

Domestic Boat Owning Group: Tidewater Marine Service, Inc., Java Boat Corporation, Schopco, Inc., Seafarer Boat Corporation, Tidewater Acquisition, Inc., Tidewater Barges, Inc., Tidewater Enterprises, Inc., Tidewater Fleets, Inc., Tidewater Grand Isle, Inc., Tidewater India, Inc., Tidewater Mediterranean, Inc., Tidewater Navigators, Inc., Tidewater Resources, Inc., Tidewater Traders, Inc., Tidewater Venice, Inc., Tidewater Ventures, Inc., Tidewater Vessels, Inc., Twenty Grand Marine Service, Inc., Twenty Grand Offshore, Inc., Tidewater Marine Pacific, Inc., and TMS Acquisition Corporation.

Foreign Boat Owning Group: Tidewater Caribe, C.A., Equipo Zulia, C.A., Tidewater Marine Service, C.A. (SEMARCA), Tidewater Marine Service, Inc. (U.K.) Limited, Tidewater Marine

West Indies Limited, Tidewater Balboa, Inc., Tidewater Colon, Inc., Tidewater Nautico, Inc., Tidewater Marine Panama, Inc., Tidewater Liberia, Inc., Tidewater Monrovia, Inc., Tidewater Timbo, Inc., Tidewater Cayman, Inc., Tidewater Georgetown, Inc., Pacific Tidewater Marine Ltd., and Pacific Tidewater Pty. Ltd.

Compression Group: Tidewater Compression, Inc., Tidewater Compression Service, Inc., Tidewater Compression NE, Inc., Tide-Air, Inc., Texcentric, Inc., Western Air Drilling Service Co., Colorado Air Drilling, Inc., and R. L. Frailey, Inc.

Domestic Operating Group: Tidex, Inc., Western Boat Operators, Inc., Eastern Boat Operators, Inc., and Tidewater Marine Towing, Inc.

Foreign Operating Group: Tidex Private Limited, Tidex International, Inc., Pan-Marine International, Inc., International Offshore Services (U.K.) Limited, International Offshore Services (Holland) B.V., and Pan-Marine do Brasil Transportes Ltda.

Oil & Gas Group: Tidewater Energy, Inc., Hilliard Oil & Gas, Inc., Tidewater SE Sumatra, Inc., Tidewater NW Java, Inc., Hilliard Properties, Inc. and Tide-Oil, Inc.

Service of Legal Process Company: S.O.P., Inc.

Contractor Services Group: Tidewater Contractor Services, Inc., Tidewater Contractors, Inc., and XPLO Corporation.

Real Estate Group: Tidewater Realty, Inc.

Insurance Group: Pental Insurance Co. Ltd.

Joint Venture Group: Tidewater Port Jackson Marine Pty. Limited, Equipo Mara, C.A., Tidewater Chartering Pty. Ltd., Tidex Nigeria Limited, and Tidex Malaysia Sdn. Bhd.

Wilshire Oil & Gas Company of Texas:

Parent Company: Wilshire Oil Company of Texas

Subsidiaries: San Francisco Oil Company, Dritalta Zenzolano Limited, Wilshire Oil of Canada Limited, and Rockland Resources Company.

Southern Cross Limited of Colorado:

Subsidiaries: Crux, Ltd. and Crux International, Ltd.

C.D.C. Producing Company:

Parent Company: Canterra Petroleum, Inc., the present owner of this interest.

Subsidiaries: Canterra Enterprises, Inc., Canterra Coal, Inc., and Canterra Sulphur, Inc.

Williams Exploration Company:

Parent Company: The Williams Companies

Subsidiaries of The Williams Companies (Affiliates of Williams Exploration Company): Agrico Chemical Company, Agrico Canada Limited/Limitee, Agrico Chemical (Europe), Inc., Agrico Chemical of Oklahoma, Inc., Agrico Disc, Inc., Agrico Egypt Limited, Agrico Foreign Sales Corporation, Agrico Interamericana, S.A., Agrico International Far East, Inc. Agrico-Korea Enterprises, S.A., Nanhae Chemical Corporation,

Agrico North Carolina Properties, Inc., Agrico Overseas Company, S.A., Agrico Overseas Investment Corporation, Agrico Overseas Development Corporation, Agrico Shipping Company, Agrico Thailand, Inc., Agrico Trinidad, Inc., Colag, Inc., Crop Production Services, Inc., Fishhawk Ranch, Inc., The American Agricultural Chemical Company, BancOklahoma Corp., F T & T, Inc., Faustina Pipe Line Company, Langside Limited, Louisiana Resources Company, NGL Production Company, Northwest Alaska Company, Northwest Energy Company, Ap Sci, Inc., Apco Argentina Inc., Apco Properties Ltd., Inner Ocean Services Company, Inner Ocean Services, Inc., Northwest Alaskan Pipeline Company, Northwest Border Pipeline Company, Northwest Canadian Gas Sales Company, Northwest Central Pipeline Corporation, Northwest Coal Corporation, Western Slope Carbon, Inc., Northwest Field Services Company, Northwest International Company, Northwest Argentina Corporation, Northwest Investments, Inc., Northwest Land Company, Northwest Marketing Company, Northwest Overseas Capital Corporation N.V., Northwest International Finance B.V., Northwest International Finance N.V., Northwest Pipeline Corporation, Prairie Pipe Lines Limited, Prairie Transmission Lines Limited, Pacific Northwest Realty Corporation, Northwest Exploration Company, Northwest Canada Exploration Company, Peabody Holding Company, Inc., Scissortail Natural Gas Company, Tulsa Williams Company, Wilco, Inc., Williams Brothers International Corp., Williams Exploration Company, Paraffine-Williams Company, Rainbow Resources, Inc., Williams Drilling Company of Tulsa, Williams Gas Supply Company, Williams Natural Gas Company, Williams Natural Gas Liquids Company, Williams Northwest Corporation, Williams Pipe Line Company, WillBros Terminal Company, Williams Terminals Company, Williams Realty Corp., Atria Hotel, Inc., Cafes On the Ice, Inc., 1400 Market Street, Inc., Kennedy Tower, Inc., Metro Center, Inc., 320 South Boston, Inc., Tulsa Union Depot, Inc., Willcentro, Inc., Williams Center Forum, Inc., Williams Center, Inc., Williams Center Plant, Inc., Williams Center Tower I, Inc., Williams Center

Tower II, Inc., Williams Plaza Hotel, Inc., The Barristers Club, Inc., Williams Real Estate Services, Inc., Williams Realty Developments, Inc., Williams Realty Interest, Inc., Williams Realty of Charlotte, Inc., Writers Square Condominium, Inc., WRC of Colorado, Inc., WRC of Crown Center, Inc., WRC of Kansas, Inc., WRC of San Antonio, Inc., WRC of Texas, Inc., WRC of Utah, Inc., Williams Telecommunications Company, WilTel of Illinois, Inc., WilTel of Kansas, Inc., and Williams Western Pipeline Company.

Southport Exploration Inc.:

This interest is now owned by Prospective Investment and Trading Company, whose parent company is The Pitco Company, and by Anchor Exploration, a sole corporation

The John W. Mecom Company:

Parent Company: The John W. Mecom Company

Subsidaries: Warwick Towers, Inc., Warwick Towers 2 Inc., Warwick Towers Venture, Houston International Hotel, Warwick Hotel Inc., Gran Nudder Limited, M Air, Happy Holiday, Double M Drilling, Circle Bar Salvage, Mecom Columbia, Huila Exploration Company, Mecom Production Inc., Lutcher & Moore Cypress Lumber Company, Bayou Secret, and Lutcher Moore Development.

T. Keith Marks: Not Applicable.

Donald F. Todd: Not Applicable.

Cythnia Todd Hendon: Not Applicable.

Ronald E. Martin: Not Applicable.

Guy V. Land:	Not Applicable.
Remuda Corporation:	Not applicable.
Lawrence E. Barker, Jr.:	Not Applicable.
H. T. Freeman, Trustee:	Not Applicable.
Joe Ramos, Trustee:	Not Applicable.
William W. Wilson, Trustee:	Not Applicable.
A. K. Mittelstaedt, Trustee:	Not Applicable.
Robert E. Miller:	Not Applicable.
Irving Pollack:	Not Applicable.
John C. Kinard:	Not Applicable.
Dan W. Williams:	Not Applicable.
Andrew R. Fish:	Not Applicable.
Harry Dernick:	Not Applicable.
Dernick Resources, Inc.:	
Parent Company:	Dernick Resources, Inc.
Subsidiary:	Pathex Petroleum Inc.
Marinex Petroleum Company:	Not applicable.

Roger and Company: Not applicable.

Wynn & Associates: Not applicable.

Exchange Oil & Gas Corporation:

This interest is now owned by a Texas Limited Partnership called TXP Operating Company.

Knob Hill Oil & Gas Company:

This company now owns a part of the interest formerly owned by Exchange Oil & Gas Corporation.

Leon County Development Company, Inc.:

Not Applicable.

Cameron Development Company, Inc.:

Not Applicable.

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I.

INTRODUCTION

Pursuant to Rule 16.1, the Appellees in the above-entitled matter move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Louisiana Supreme Court on the following grounds. The present case is not within the appeal jurisdiction of this Court, nor does it satisfy the requirements for jurisdiction by writ of certiorari. In addition, the federal questions sought to be reviewed were neither properly raised nor expressly passed on by the courts of Louisiana. This appeal presents no substantial federal question warranting review by this Court. Further, there are clearly adequate non-federal grounds for the decision rendered by the Louisiana Supreme Court. Finally, the questions upon which this cause depends are so unsubstantial as not to require further argument.

The authority of this Court to hear this case must arise under the provisions of 28 U.S.C. §1257 which, in the instant case, would require that the decision rendered by the Louisiana Supreme Court have considered the validity of a state statute as against constitutional attack, or that the opinion have passed upon a federal question impacting on the facts of this case. In fact, neither that ruling nor any of those rendered by the Louisiana courts in this matter mention, discuss or pass upon any federal constitutional questions, with the result that the Court lacks jurisdiction over this case. Accordingly, the appeal should be dismissed and, treating the papers as an application for a writ of certiorari, the writ should be denied. In addition, the substantive regulation of the State's natural resources which the Louisiana Supreme Court has here sustained is well within the framework of permissible state regulation which this Court has previously upheld, and the matter as decided by the Louisiana Supreme Court cannot be said to present a substantial federal question. That court's decision as rendered was based solely upon

an interpretation of state property law, and the judgment clearly rests on an independent and adequate non-federal basis. Finally, a consideration of the facts and of the decision rendered by the Louisiana Supreme Court demonstrates that the questions upon which this cause depends are unsubstantial, that there is an absence of any conflict of opinions, and that the judgment rendered below is so obviously correct as to warrant no further review.

II.

STATEMENT

Although the legal issue before this Court relates to constitutional claims, an explanation of the principles of unitization and of the key facts in the history of the unitization and the drilling of the Wainoco Oil & Gas Company - R.R. Stone No. 1 Well (hereinafter referred to as "the Stone Well") as the unit well for the Lower Abbeville A Sand, Reservoir A, Sand Unit F, Ocean View Beach Field, Cameron Parish, Louisiana, may be helpful to the Court's consideration of the primary issues.

A. OVERVIEW OF COMPULSORY UNITIZATION.

In South Louisiana, generally, and specifically in the Ocean View Beach Field, unitization of separate interests or tracts by the Commissioner of Conservation (often referred to in other juurisdictions as "pooling" or "forced pooling") involves reflecting on a surface map the area that conforms to an outline of the subsurface geology of a pool productive of hydrocarbons. As relates to a single well unit (and not a reservoirwide unit), this area is called a "drilling unit," which means "the maximum area which may be efficiently and economically drained by one well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities." La. R.S. 30:9. *See also* La. R.S. 30:3(1) and 10.

Unitization is designed to prevent waste of the State's natural resources (La. R.S. 30:3(1)), to avoid the drilling of unnecessary wells, to allow all persons owning an interest in a pool to receive their just and equitable share of production from the pool, and to protect the correlative rights of all such owners. Were unitization not available, each owner of a separate tract would have to drill his own well to produce the minerals from beneath his land and to prevent his neighbors' wells from draining his property. This would have the undesirable result of wasting the State's natural resources through the drilling of unnecessary wells and dissipation of reservoir energy.

The unitization procedure at issue in this case is compulsory or forced unitization (La. R.S. 30:10). In forced unitization (also called "forced pooling"), if the Commissioner of Conservation determines that unitization of separately-owned tracts is appropriate, he is required to force pool these tracts and interests and to order the owners to develop their lands as a single, integrated unit, even if various owners disagree and oppose his decision.

When a compulsory unit is created, all of the tracts in the unit are treated as a single entity for the purpose of development, and the drilling of the unit well as a well capable of producing hydrocarbons constitutes the development of the unit. No other wells can be drilled to the unitized sand within the unit (except alternate or substitute unit wells which must be expressly authorized by the Commissioner), and unit operations on the designated tract are considered to be operations on every tract within the unit. In order to maximize recovery from this one unit well and to prevent the loss or waste of reservoir energy and of hydrocarbon reserves, it is critically important to all owners in the unit that the well be located at the optimum geological location for the most efficient drainage from the unit. The legislative grant of power to the Commissioner and the right of the owners in the unit to rely on the power of the Commissioner to authorize and require the location of the unit well at the optimum geological location are the substantive issues that were presented to the Louisiana Supreme Court.

B. ANALYSIS OF THREE CRITICAL EVENTS.

The Appellees are not in agreement with Appellant's incomplete and, in part, inaccurate presentation of the facts. However, in the interest of simplicity, Appellees refer this Court to the description of the pertinent facts as set forth in the opinions of the Court of Appeal and of the Louisiana Supreme Court cited and discussed hereinbelow. For purposes of this Motion, a review of the key facts in light of the function of unitization indicates that the Court's consideration should focus on three critical events: (a) the original unit order; (b) the original and amended well permits; and (c) the Commissioner's order confirming the unit well.

1. The Original Unit Order.

The Commissioner issued Order No. 1095 and 1016-B-2 effective May 20, 1980, creating Sand Unit F, and included a portion of the Appellant's property within that unit. The Commissioner adopted the geology proposed by those owners, including the Appellant, seeking the creation of the unit. The evidence presented by the owners indicated that the highest structural position within Sand Unit F, and therefore the optimum area for the unit well, was located in the western portion of the unit and included the Appellant's tract.

At the time the order was issued, the Stone Well had not been drilled, and the Commissioner designated the location of the unit well by reference to Statewide Order No. 29-E. Reference to Statewide Order No. 29-E has been customary since 1960 when establishing a unit for which a well has not yet been drilled, and both the Court of Appeal and the Louisiana Supreme Court correctly accepted that long-standing practice as a proper method of designating the location of a unit well and complying with La. R.S. 30:9C to assure the drilling of the unit well at an optimum geological location.

Statewide Order No. 29-E (issued in 1957) provides minimum spacing requirements between wells and between wells and property

lines. The order defines "property line" as the boundary dividing tracts on which mineral rights are separately owned, except that when a unit has been created, the order provides that the boundary of the unit shall be considered the "property line" for purposes of the spacing rules. Therefore, when a unit has been created, the Commissioner is not concerned with how close a well is to the boundary between separately-owned tracts within the unit, but with whether the well is a sufficient distance from the unit boundaries to insure that the designated unit area is properly developed and that the well does not drain the area outside of the unit. This is consistent with the function of forced unitization to require the development of the separate tracts as a single, integrated entity.

2. The Original and Amended Well Permits.

Sometime after the unit was established, Wainoco applied for a permit to drill the Stone Well. The permit to drill was duly issued, authorizing Wainoco to spud a well on the surface of the Stone tract and to drill to the unitized sand in compliance with Order No. 1095 and 1016-B-2 and with Statewide Orders Nos. 29-B and 29-E. After the well had been drilled and completed, Wainoco filed a Report of Apparent Deviation with the Office of Conservation showing that the deviation of the well was in compliance with Statewide Order No. 29-B, Section XVIII.

One of the purposes of Statewide Order No. 29-B is to insure that the well bore does not cross the boundaries between separately-owned tracts or, in the case of a unit, the unit boundary. Section XVIII of that regulation generally permits a deviation of the well bore from the vertical up to five degrees and requires the operator of the well to take an inclination survey. The inclination survey is used merely to determine the maximum possible deviation from the vertical for purposes of determining whether the well bore might have crossed a property line. In the case of a unit, Statewide Order No. 29-B, like Statewide Order No. 29-E, defines "property line" as the boundary of the unit.

The inclination survey of the Stone Well established that the bottom hole was well within the five-degree permissible deviation and did not cross the unit boundary. However, since the geological evidence presented to the Commissioner regarding this unit showed that the optimum position for drilling the unit well was in the area of the Appellant's property and the well was permitted accordingly, the five-degree deviation permitted by Statewide Order No. 29-B necessarily created the distinct possibility of drilling under Appellant's property.

It is undisputed that Wainoco, as operator, drilled the Stone Well in compliance with both of these Statewide Orders and in accordance with the geology adopted by the Commissioner. As contemplated by the actions of the Commissioner, the well bore remained entirely within the geographical confines of the unit and the guidelines of the Statewide Orders to develop all of the consolidated tracts as a single, integrated entity.

3. The Commissioner's Order Confirming the Unit Well.

When the Stone Well was completed in and began producing from the unitized sand in December of 1980, no one knew that the well bore was actually located in the subsurface of the Appellant's property. The Appellees knew only that the bottom hole of the well deviated one degree from the vertical and was in compliance with the order establishing Sand Unit F and with Statewide Orders Nos. 29-B and 29-E. However, the Commissioner had occasion to consider the actual bottom-hole location in issuing Order No. 1095-B and 1016-B-3.

On the basis of new geological evidence obtained in the drilling of the Stone Well and another well in the Ocean View Beach Field, and partially in response to a suit filed by Appellant in August of 1981, Wainoco filed a pre-application notice outlining its plan to apply for a public hearing seeking the confirmation of the boundaries of Sand Unit F and of the designation of the Stone Well as the unit well. A pre-application conference relative to the matter was held at

the Appellant's request and was attended by the Appellant's geologist, Mr. Namias. The public hearing was held on June 8, 1982. At that hearing, prior to the issuance of Order No. 1095-B and 1016-B-3, the Commissioner considered the geological and engineering evidence relative to the optimum location of the unit well for Sand Unit F, as well as the objections of Appellant. All of the evidence presented to the Commissioner indicated that the optimum geological location for the Stone Well was, in fact, where the well was located. The Appellant was present and had every opportunity to present evidence to the contrary, yet he did not. Indeed, he has never to this date disputed that the well is located at the optimum geological location for production from the unit. He did appear to remind the Commissioner of his suit, to protest the well as a trespass and to seek its removal. All other parties in the unit supported the order sought by Wainoco.

Had the Commissioner acceded to Appellant, the removal of the well would have resulted in waste by the destruction of a producing well and in a significant decrease in the ultimate recovery of the reserves underlying the unit. Furthermore, because of the stage of reservoir depletion, a substitute unit well probably would not have been economically feasible, and the remaining reserves would be lost and/or drained by the other producing wells in the Ocean View Beach Field to the prejudice of the correlative rights of all parties with interests in the unit, including the Appellant and the other landowners and/or their lessees. For these reasons, all of which are uncontested, and because the well was properly located originally, the Commissioner confirmed the unit configuration and the designation of the unit well and specifically found the order to be "reasonably necessary to conserve the natural resources of the state, to prevent waste as defined by law, to avoid the drilling of unnecessary wells, and otherwise to carry out the provisions of the laws of this state."

III.

PROCEEDINGS BELOW

The Appellant filed this action on January 26, 1982, in the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, under Docket No. 253,360-M, against Wainoco Oil & Gas Company, the other owners of working interests in the unit in question, and the Commissioner of Conservation. Appellant alleged that bottoming the Stone Well under his property constituted a trespass, and he sought an injunction ordering the unit operator to remove the well bore. Subsequently, Appellant moved for summary judgment on the issue of his right to an injunction, and the Defendants filed a cross-motion for summary judgment asking that Appellant's suit be dismissed if the court upheld the Commissioner's authority and duty to designate the unit well. The trial judge, the Honorable Lewis S. Doherty, III, denied Appellant's motion, granted the motion for summary judgment on behalf of the Commissioner of Conservation, dismissing the Commissioner as a defendant, and granted partial summary judgment in favor of the Appellees, affirming the Commissioner's refusal to order removal of the well and the right of the Appellees to continue to operate the well as the unit well under the provisions of the Commissioner's orders.

The Appellant appealed that ruling, and the First Circuit Court of Appeal rendered judgment on October 8, 1985, as reported in *Nunez v. Wainoco Oil & Gas Co.*, 477 So.2d 1149 (La. App. 1st Cir. 1985). In that opinion, the Court of Appeal affirmed the motion for summary judgment granted in favor of the Commissioner of Conservation and concluded that "the commissioner was within his authority to issue the unitization order and to designate a unit well thereon." 477 So.2d at 1154. However, with regard to the Appellees, the Court of Appeal ruled that the Commissioner's orders did not and could not authorize drilling on or under unleased property without the consent of the landowner. Thus, although the well in question was the unit well, the Court of Appeal held that its presence

under Appellant's property could constitute a trespass, and the case was remanded to the trial court for determination of whether a trespass in fact took place and, if so, whether the trespass was in good or bad faith. On October 22, 1985, Appellees applied to the Court of Appeal for rehearing, and that motion for rehearing was denied on November 8, 1985.

Following a writ application by Appellees, the Supreme Court of the State of Louisiana granted writs on January 31, 1986. *Nunez v. Wainoco Oil & Gas Co.*, 481 So.2d 1326 (La. 1986). In the opinion rendered in this matter on May 20, 1986,*Nunez v. Wainoco Oil & Gas Co.*, 488 So.2d 955 (La. 1986), the Louisiana Supreme Court framed the issues as follows: (1) Whether the intrusion of a well bore (several inches in diameter) into the earth, at a point two miles beneath the surface, constitutes a trespass on the surface owner's property, where that property is included in a drilling unit created by the Commissioner of Conservation; and (2) Whether, if a protected interest is involved, Louisiana Revised Statutes 30:1 et seq. (which establishes and regulates the Office of Conservation and specifically authorizes the Commissioner to establish drilling units) supersedes the surface owner's right to absolute control of the subsurface as apparently envisioned by Louisiana Civil Code article 490. Put another way, the court was to consider whether the formation of a compulsory unit, as permitted in La. R.S. 30:10, affects the applicable general principles concerning ownership of property and alters the concept of trespass beneath the surface owner's tract.

In its opinion, the court traced the history and development of the Louisiana Conservation Act, as well as the pertinent powers granted to the Commissioner of Conservation by the Louisiana Legislature in that Act pursuant to Article IX of the Louisiana Constitution of 1974. Noting the specific power of the Commissioner to require unwilling or non-consenting owners to pool their interests if he finds it necessary to prevent waste or to avoid the drilling of unnecessary wells, the court found that this concept of unitization embodying the principle of ownership of minerals produced from a common source of supply, co-extensive with the individual ownership of the

overlying land, is a departure from the traditional notions of private property. In addition, the articles relative to ownership contained in the Louisiana Civil Code have been modified in recent years to reflect a qualification of such rights in private property as being expressly "subject to reasonable statutory restrictions and the reasonable exercise of the police power." La. Const. art. I, §4.

The Louisiana Supreme Court held that unitization, which creates rights and interests in a pool of hydrocarbons beyond the traditional property lines, effectively amends Louisiana Civil Code article 490 and other private property laws in the interest of conserving the natural resources of the state and, in effect, of protecting private property interests, or "correlative rights," of non-drilling landowners. Unitization is an appropriate exercise of the police power that has previously been held to be constitutional. The power of the Commissioner of Conservation to unitize includes not only the authority to establish drilling units for each pool, but also to designate a drilling site "at the optimum position in the drilling unit for the most efficient and economic drainage of such unit." La. R.S. 30:9C. Thus, the court concluded that the intrusion into the subsurface two miles beneath the tract owned by Appellant was an authorized unit operation and that, since established private property law concepts, such as trespass, have been superseded in part by Louisiana's Conservation Act when a unit has been created by order of the Commissioner, a legally actionable trespass had not occurred in this instance.

IV.

ARGUMENT

For the reasons set forth below, Appellees contend that the instant case does not warrant plenary consideration by this Court and that summary disposition of this matter is appropriate.

A. THE INSTANT CASE IS NOT WITHIN THIS COURT'S JURISDICTION AND SHOULD BE DISMISSED.

In the Jurisdictional Statement filed with this Court on August 21, 1986, the Appellant notes that this is a direct appeal from a judgment by the Louisiana Supreme Court and that jurisdiction for this appeal is conferred on this Court by, alternatively, one of the three provisions of 28 U.S.C. §1257. In addition, Appellant presents as questions on appeal whether certain acts of the Commissioner of Conservation either violated due process provisions of the Federal Constitution or failed to constitute proper and reasonable exercises of the police powers granted to the Commissioner, and whether provisions of the Louisiana Conservation Act or Mineral Code as interpreted in the decision rendered by the Louisiana Supreme Court violated principles of due process under the Federal Constitution.

Of initial importance is the question of whether this matter may be said to be properly within the jurisdiction of this Court over final judgments or decrees rendered by the highest court of a state as provided in 28 U.S.C. §1257. Considering the opinion by the Louisiana Supreme Court in this matter and the grounds therefor, it is clear that there is no jurisdiction by appeal under 28 U.S.C. §1257(1), as the validity of a treaty or statute of the United States has not been drawn in question, and there has obviously been no decision against one's validity.

The second basis for appeal jurisdiction over state court rulings is contained in 28 U.S.C. §1257(2), which requires that the validity of a statute of the state be drawn in question on the ground that it is "repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." In the present case, at all times prior to the filing of the Jurisdictional Statement, the Appellant failed to properly assert that any statute of the State of Louisiana or, in particular, any provision of the Louisiana Conservation Act or Mineral Code, violated the due process protections of the Federal Constitution. It is also manifest that none of the three opinions

rendered by Louisiana courts in this matter mentioned, discussed or determined any challenge to the validity of a Louisiana statute under the Federal Constitution. Indeed, as acknowledged by Appellant at page 19 of the Jurisdictional Statement, the Louisiana Supreme Court took no action relative to the question of the constitutionality of any statute. Thus, because of the nature and content of the judgment of the Louisiana Supreme Court, the necessary prerequisites to invoking the appeal process pursuant to 28 U.S.C. §1257(2) are not met. In such instances, 28 U.S.C. §2103 provides that the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari. However, in the instant case, this Court would still lack jurisdiction under 28 U.S.C. §1257(3).

Under the provisions of 28 U.S.C. §1257(3), this Court would have jurisdiction by writ of certiorari in the present case if the validity of a state statute was drawn in question on the ground of its being repugnant to federal law or where a title, right, privilege or immunity was set up or claimed "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." As noted above, the Louisiana Supreme Court did not consider any constitutional attack upon a state statute. In addition, the Louisiana Supreme Court's decision did not pass upon *any* federal question but rather, as demonstrated below, rested solely on an adequate and independent non-federal ground. Thus, because the Louisiana court did not in fact pass on the impact of any federal question upon the facts of this case, this Court also lacks jurisdiction by writ of certiorari and such writ should be denied.

In summary, the instant case fails to satisfy any of the jurisdictional requirements set forth in 28 U.S.C. §1257. The decision rendered by the Louisiana Supreme Court simply does not mention, discuss or pass upon any federal constitutional questions, and the matter was clearly decided solely on the basis of state law. In light of those facts and as will be discussed more fully below, it is evident that this case also presents several other bases for dismissal, *i.e.*, that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on below, that the

matter fails to present a substantial federal question, that the judgment below rests on an adequate non-federal basis, and that the questions involved in the matter were properly determined below. In any event, it is clear that this Court lacks either appeal or certiorari jurisdiction in this matter, with the result that the appeal should be dismissed or, alternatively, the writ should be denied.

B. THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NEITHER PROPERLY RAISED NOR EXPRESSLY PASSED ON BY THE COURTS OF LOUISIANA.

It is essential to the jurisdiction of this Court under 28 U.S.C. §1257 that a substantial federal question have been properly raised in the state court proceedings. Under the statutory requirements, it is necessary that the validity of the state statute have been "drawn in question" or that the federal right have been "specially set up or claimed." It was early established by the Court that the validity of a statute is "drawn in question" only if "the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied." *Miller v. Cornwall R. Co.*, 168 U.S. 131, 133 (1897). It is not enough to draw a statute into question by controverting rights claimed thereunder, or by disputing an act done by virtue of such statute. *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 226 (1889).

In the present case, as noted above, the Appellant has previously failed to properly assert that any statute, and specifically the Louisiana Conservation Act or Mineral Code, violated the due process provisions of the Federal Constitution. None of the opinions rendered by the Louisiana courts have mentioned, discussed or considered any constitutional attack upon a statute. The Court has stated many times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the

contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). It is too late, of course, to raise the federal question for the first time in the notice of appeal to the Supreme Court or in the jurisdictional statement. Such papers are not part of the record of the state court proceedings, and it is that record which must affirmatively show a raising of the federal issue in question. *See White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929). Thus, the Appellant in the present matter has failed to timely or properly raise any federal question as to the subject statutes, and that portion of the appeal should be dismissed on those grounds.

In the Jurisdictional Statement, the Appellant also seeks to assert a federal question in connection with certain acts of the Commissioner of Conservation and the exercise of the police power in connection with the State's natural resources. As noted previously, none of the Louisiana courts rendering opinions in this matter have treated or resolved any such question on a federal constitutional basis. The attempts by Appellant to affirmatively show that this federal question was properly presented reveal only generalized statements and arguments which are vague and, at times, difficult to comprehend. Appellees contend that an issue exists as to whether such questions have been presented "with fair precision." *State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

This Court has in the past required reference to the particular clause of the Federal Constitution relied upon, as well as the rights claimed thereunder. In prior rulings, the Supreme Court has held insufficient a mere reference to the "Constitution of the United States", *Herndon v. Georgia* , 295 U.S. 441, 442-43 (1935), or the "Constitution and laws of the United States",*Oxley Stave Co. v. Butler County*, 166 U.S. 648, 654 (1897), or to "due process of law", *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). The Court, in *Webb v. Webb*, 451 U.S. 493, 496-98 (1981), held it insufficient, in framing a claim under the Full Faith and Credit Clause of the Federal Constitution, simply to assert that a Florida decision "should be accorded full faith and credit" by a Georgia court. Although the

petitioner in that case did use the phrase "full faith and credit" at several points in the proceedings below, she never cited to the Federal Constitution nor to any cases relying on the Full Faith and Credit Clause of the Federal Constitution. In any event, the majority, noting that the Georgia court had not in fact passed upon the impact of the federal question on the facts of the case, concluded that the Court lacked jurisdiction and dismissed the writ of certiorari that had been granted.

In the present case, it is questionable as to whether the federal questions raised in the Jurisdictional Statement are in fact the same as those alluded to in the proceedings below. Here, as in the *Webb* decision, the fact remains that the Louisiana Supreme Court never mentioned, let alone expressly passed upon, any federal question in its decision. On that basis alone, it is evident that this matter should be dismissed because the federal questions sought to be reviewed were neither properly raised nor expressly passed on by the Louisiana court.

C. THIS MATTER PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT.

In the Jurisdictional Statement, the Appellant raises the questions of whether certain acts of the Commissioner of Conservation violated the due process provisions of the Federal Constitution or were not proper and reasonable exercises of the police power, and whether certain Louisiana statutes as interpreted by the Supreme Court of Louisiana were contrary to the federal due process provisions. It is clear from a reading of the opinion rendered by the Louisiana Supreme Court in this case that there exists no substantial federal question warranting consideration by the Court. In point of fact, the ruling of the Louisiana Supreme Court contains no decision of any federal question, but was decided solely upon an interpretation of state law as applicable to these facts. Even considering the federal question claims presented by the Appellant in these proceedings, it is

clear that none of the claims can be said to constitute a substantial federal question, and each arises in connection with questions previously decided by this Court relative to the constitutionality of similar statutes and actions performed thereunder.

While the opinion rendered by the Louisiana Supreme Court did not expressly consider any federal question arising in connection with this matter, an examination of that opinion and a survey of the prior Supreme Court decisions and other jurisprudence pertaining to the questions raised demonstrate that these claims are without substance and clearly do not warrant or require consideration in the disposition of this case. As previously discussed, the Louisiana Supreme Court framed the issues in this matter as whether a legally actionable trespass could occur under the facts presented and whether, if a protected interest was involved, the Louisiana Conservation Act operated to supersede certain private property law concepts as embodied in the Louisiana Civil Code. That opinion contains no mention of or determination as to any federal question involving the protections of the Fourteenth Amendment. Rather, the opinion turns on the effect of the formation of a compulsory unit by the Commissioner of Conservation relative to the property rights of the landowners included within such a unit. The only references to constitutional authority are to the Louisiana Constitution of 1974 and its provisions relative to protecting and conserving the natural resources of the State and to limiting the right of ownership as subject to reasonable statutory restrictions and the reasonable exercise of the police power. Following a thorough consideration of the applicable state law, the Louisiana Supreme Court held that unitization, which creates rights and interests in a pool of hydrocarbons beyond the traditional property lines, effectively amends certain Louisiana private property laws in the interest of conserving the natural resources of the State and, in effect, of protecting private property interests, or "correlative rights," of non-drilling landowners.

As noted previously, the Louisiana Supreme Court did not deem it necessary to specifically consider in its ruling any of the federal

questions as to due process now raised by the Appellant. Instead, the decision turns upon an interpretation of state law, both constitutional and statutory, and the effect of that law upon property rights as created under the Louisiana Constitution and the Louisiana Civil Code. As is often stated, such property interests are not created by the Federal Constitution, but rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In the present case, it is clear that the Louisiana Supreme Court found that any property interest involved was conditioned upon the limitations contained in the articles of the Louisiana Civil Code and in Article I, §4 of the Louisiana Constitution. In such cases, this Court will inquire only as to whether the decision of the state court rests upon a fair or substantial basis, and "if there is no evasion of the constitutional issue, ... and the nonfederal ground of decision has fair support, ... this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944).

As discussed, the opinion of the Louisiana Supreme Court principally involved a consideration of the extent and effect of the police power granted to the Commissioner of Conservation by the Louisiana Legislature to establish compulsory drilling units for the purpose of conserving the natural resources of the State and of protecting private property interests. The court noted that such power has been held to be a constitutional exercise of the State's police power, citing *Hunter Co., Inc. v. McHugh*, 202 La. 97, 11 So.2d 495 (1942), *appeal dismissed*, 320 U.S. 222 (1943). As noted therein, this Court has acted repeatedly to uphold various provisions of conservation statutes against similar constitutional attacks. *See Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376 (1939); *Henderson Co. v. Thompson*, 300 U.S. 258 (1937);

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931); *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920); *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900). Thus, the Louisiana Supreme Court applied well-settled principles relative to what constitutes a proper and reasonable exercise of the police power.

It is clear from a survey of the jurisprudence that the Commissioner's designation of the unit well at a location that will achieve the purposes of the legislation is a constitutional exercise of the police power of the State to regulate the taking of natural resources and does not constitute a taking of property without due process of law. Under the traditional due process analysis employed by the courts, the statute in question must serve a legitimate state purpose and must be within the authority of the state to secure, preserve and promote the general health, welfare and safety of its citizens. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954). The purposes of the statute at issue here, the conservation of natural resources, the prevention of waste and the protection of correlative rights in the common pool, have all been held to be legitimate purposes for the exercise of the State's police power. In *Lilly v. Conservation Commissioner of Louisiana*, 29 F. Supp. 892 (E.D La. 1939), the court upheld the constitutionality of the Commissioner's power to set allowables for production, finding that the protection of correlative rights is a proper basis for the Commissioner's acts. Other cases have specifically recognized as bases for the exercise of the police power the conservation of oil and gas resources, the prevention of waste and depletion of such resources, and the promotion of maximum recovery of resources. *See, e.g., Sun Oil Co. v. State Mineral Board*, 231 La. 689, 92 So.2d 583 (1956), *appeal dismissed*, 353 U.S. 962 (1957); *Smith v. Holt*, 223 La. 821, 67 So.2d 93 (1953); *Crichton v. Lee*, 209 La. 561, 25 So.2d 229 (1946). In considering the constitutionality of various actions taken under the conservation statutes, the courts weigh the public interest served by the action and the individual right curbed by the Commissioner's order and nearly

always strike the balance in favor of the public interest, finding that private property rights must yield. *Trunkline Gas Co. v. Steen* , 249 La. 520, 187 So.2d 720 (1966); *Smith v. Holt*, *supra*; *Alston v. Southern Production Co.*, 207 La. 370, 21 So.2d 383 (1945).

The second inquiry of the due process analysis is whether the action taken under the statute is a reasonable means of achieving the legislative purposes. As discussed previously, the unitization of individually-owned interests and the designation of a unit well at an optimum location protect the correlative rights of all owners within the unit and prevent waste and the drilling of unnecessary wells. The Louisiana Conservation Act sets forth as the standard for the location of the unit well that it be located at an optimum point for efficient and economic drainage of the unit. However, the Commissioner may make such exceptions to the required location "as may be reasonably necessary where topographical conditions exist that would make such a location of the unit well unduly burdensome . . . ." La. R.S. 30:9C. This balancing of geological and topographical factors by the Commissioner insures that any landowner or leaseholder whose interest will be burdened by the location of the unit well will be afforded due process. The Appellant here was afforded due process by having the opportunity to present evidence and argument against the location of the Stone Well, and the records of the public hearings show that Appellant had notice of and was present or represented by his geologist at each of the hearings dealing with the unitization and location of the Stone Well. Further, the findings contained in the unit order show that the Commissioner did effectively balance the competing interests of the parties.

Actions far more intrusive on private property rights than the designation of a unit well located beneath an unleased owner's property have been upheld by the courts as valid exercises of the state's police power. In *Sun Oil Company v. State Mineral Board*, *supra*, a statute that authorized the State Mineral Board to execute mineral leases on lands owned in indivision by 500 or more persons for the benefit of all the owners, whenever any 50 or more of the co-

owners of the property petitioned the board to lease it, was held constitutional. The court in that case found:

> [I]t is patent that such rights are subordinate to the valid exercise by the state of its police powers. And it has long since been established that the state's police powers justify measures for the regulation of production of oil and gas and for the conservation of these valuable deposits .... Such a measure, designed to benefit the state and all the co-owners affected, is clearly a valid exercise of the police power, much the same as is an order of the Commissioner of Conservation establishing compulsory drilling units, and private rights succumb thereto.

92 So.2d at 588.

Similarly, in *Hunter Co., Inc. v. McHugh*, *supra*, the plaintiff contended that forcing it to combine its lease with land leased to others for the purpose of gas production and to share with them its pipeline and other marketing facilities, without compensation, was a deprivation of property without due process. The decision was appealed to the United States Supreme Court, which dismissed the appeal, stating:

> [T]he record presents no substantial federal question. We have held that a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.

320 U.S. at 227. The action upheld in the *Hunter* case, the forced sharing of production discovered and of production and marketing facilities constructed solely by the Hunter Company, is a far more severe intrusion on property rights than the forced acquiescence in the use of the subsurface of property for the drilling of the unit well.

Finally, the power of an administrative agency to designate a unit well location on the *surface* of an unleased tract within the unit has been expressly upheld by the Oklahoma Supreme Court. In *Texas*

Oil and Gas Corp. v. Rein , 534 P.2d 1277 (Okla. 1974), the court upheld a Corporation Commission order authorizing the drilling of a unit well on the land of an unleased owner, finding that the Oklahoma statute empowers the commission to establish the unit well at any location within the unit. The court found that the well location designation did not constitute an exercise of eminent domain, nor did it deprive the landowner of his property without due process of law. Thus, as indicated above, the courts have upheld much more drastic actions taken by the state to protect the correlative rights of landowners within the unit than that exercised by the Commissioner of Conservation in the instant case.

In summary, it is clear that the decision in this matter by the Louisiana Supreme Court was correctly rendered on the grounds stated therein. In addition, in numerous cases involving similar constitutional attacks upon state conservation statutes and actions taken by administrative agencies pursuant thereto, this Court has repeatedly acknowledged such statutes and actions as reasonable and proper exercises of the state's police power. More specifically, the Louisiana Conservation Act and other conservation measures taken by the Commissioner under its authority have been held to be legitimate exercises of the State's police power when subjected to constitutional due process challenges. Finally, administrative actions far more intrusive on private property rights than those in question here have been upheld by the courts as valid exercises of the state's police power. Thus, even considering the Appellant's arguments on their merits, this matter cannot be said to present a substantial federal question and, on that basis alone, should be dismissed.

D. THE JUDGMENT OF THE LOUISIANA SUPREME COURT IN THIS MATTER IS CLEARLY BASED UPON ADEQUATE NON-FEDERAL GROUNDS.

As previously discussed, the opinion rendered in this matter by the Louisiana Supreme Court must be seen as turning solely upon an interpretation of state law. As framed by the court in its ruling, the

specific legal issue presented was whether the Louisiana Conservation Act operated to supersede certain property concepts as embodied in the provisions of the Louisiana Civil Code. At issue here were the effects of, and possible conflict between, specific Louisiana statutes. A simple reading of that judgment leaves no question that the matter was properly determined upon a substantial and sufficient non-federal basis and, as noted previously, this Court has no jurisidiction to review the case and this matter should be dismissed.

In matters such as the present one, this Court will inquire as to "whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Weaver* , 282 U.S. 765, 773 (1931). If the Court concludes that the state ground is both independent and adequate to support the judgment, "this court will not assume jurisdiction of the case", *Klinger v. Missouri*, 13 Wall. 257, 263 (1871), inasmuch as "our jurisdiction fails", *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). The "independent and adequate state ground" rule is thus a corollary of the fundamental principle that the Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. §1257.

In the instant case, the sole basis of the decision was one of construction of state statutes, and the matter cannot properly be the subject of either appeal or certiorari. Even if it could properly be said that the validity of a statute had here been sustained in the face of federal objections, the Supreme Court on appeal must accept the state court's construction of the statute and proceed to test the validity on that basis. *Kingsley Intern. Pictures Corp. v. Regents* , 360 U.S. 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). Where, as here, "there can be no pretense that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to

any federal question, this Court accepts the decision whether right or wrong." *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *Nickel v. Cole*, 256 U.S. 222, 225 (1921).

In summary, because the opinion of the Louisiana Supreme Court rested upon a determination as to the meaning and application of state law, this Court must be said to lack jurisdiction in this matter. The issue involved was one as to the effect of the Louisiana law relative to unitization upon certain principles of private ownership, and the resolution of a possible conflict between two bodies of state statutory law, with the resulting finding being that one effectively amended or superseded the other. The decision as rendered by the Louisiana Supreme Court was based only upon consideration of state law, both constitutional and statutory, without any reference to or determination of a federal question. Thus, because that judgment must be said to rest upon an independent and adequate non-federal basis, this matter should be dismissed.

E. THE QUESTIONS UPON WHICH THIS CAUSE DEPENDS ARE UNSUBSTANTIAL, THERE IS AN ABSENCE OF ANY CONFLICT OF OPINIONS, AND THE JUDGMENT RENDERED BY THE LOUISIANA SUPREME COURT IS SO OBVIOUSLY CORRECT AS TO WARRANT NO FURTHER REVIEW.

As demonstrated above, the decision rendered in this matter by the Louisiana Supreme Court did not specifically involve the consideration of a substantial federal question, and clearly rests on an independent and adequate non-federal basis. In addition, under any reasonable consideration of that opinion, it is clear that the court reached the correct result, both under the applicable law and the facts of this case.

All three Louisiana courts which have reviewed this case have concurred in the conclusions that Wainoco, as operator, complied with the rules, regulations, orders and permits of the Office of Conservation and that the Commissioner acted properly and fully

within his powers in all of his orders, rulings and permits. First, the orders and permits issued by the Commissioner authorized the Stone Well to be drilled at its present location and to be completed beneath the Appellant's property, and it is undisputed that the well was drilled in conformance and compliance with its permits, Order No. 1095 and 1016-B-2, and all applicable statewide orders, including Nos. 29-B and 29-E. Additionally, in Order No. 1095-B and 1016-B-3, the Commissioner found that the unit and unit well location were reasonable and appropriate and should be confirmed, and he refused to order the removal of the well. Therefore, Wainoco, as operator, complied with the terms of the permits and orders in conducting its operations for the drilling of the Stone Well and relied upon the authorization for such operations given to it, as operator, by the Commissioner.

Second, the Commissioner's authorization of the location of the well is in conformance with the authority in La. R.S. 30:10A of the Louisiana Conservation Act to compel the pooling of separate tracts and their development as a single, integrated unit, and with the duty under La. R.S. 30:9C to provide for the location of the unit well at the optimum position for the most efficient and economic drainage of the unit, regardless of the consent to that location or lack thereof by landowners or lessees. In fact, the Commissioner was dismissed as a party by the Trial Court and by the Court of Appeal, and with respect to the latter, the Appellant did not contest that dismissal by seeking review in the Louisiana Supreme Court.

Third, in reviewing the actions of the Commissioner and in judging the issue presented in these proceedings, the Court should consider not only the Commissioner's express authority, but the purpose and intent of the Louisiana Conservation Act: the prevention of waste; the avoidance of the drilling of unnecessary wells; the efficient and economic drainage of the unit; and the just and equitable sharing of the oil and gas in the pool. The process of compulsory unitization is designed to protect the correlative rights of all of the owners in a common pool from the unreasonable exercise of rights by any individual owner, and allowing one owner to block the

production of the common resources by withholding his consent to a provision of the unit orders and permits would frustrate the express purposes of the conservation statute. Thus, a ruling in favor of Appellant granting an injunction for the removal of the Stone Well would be counter to the public interest and would undermine the public policy of this State.

The Commissioner's power to unitize separately-owned tracts has eliminated the destructive and wasteful practice of drilling unnecessary and competitive wells that dissipate reservoir energy and reduce the amount of hydrocarbons ultimately recoverable from the pool. The exercise of that power necessarily has resulted in the infringement of individual rights of owners in the unit by prohibiting them from drilling wells on their own tracts, by forcing them to share production and equipment and by limiting the amount of hydrocarbons that can be produced, but has insured the correlative rights of each party to receive his just and equitable share of the oil and gas in the pool. The authority of the Commissioner to force pool and require development of separate tracts on a single unit irrespective of the agreement of the owners of those tracts and to designate a unit well at the optimum geological location that will afford economical and efficient drainage of the pool is equally necessary to protect correlative rights and to prevent waste. It is indeed an integral part of the statutory scheme of the conservation of natural resources in the State.

A contrary result such as Appellant seeks herein would allow one landowner within a unit to receive the economic benefits of unitization while preventing the unit from being produced in the most efficient and economical manner by arbitrarily withholding his consent to the location of the unit well beneath his property. Such a result would have an unfair and pernicious effect upon the correlative rights of the other owners of property within the unit. Almost every action of the Commissioner impacts property rights. The Commissioner's action in this instance is the least intrusive method for insuring maximum recovery of the unit reserves. The Appellant, who had sought to have the well drilled, who has contributed to its

cost, and who has been paid his share of the proceeds from the sale of production, is in no different posture than anyone with the right to drill for minerals on a tract of land, whether an unleased owner or lessee; the argument urged by him could be urged by any of them. The fact that the Appellant has not consented to the subsurface location of the well does not make him a special exception and should not permit him to invalidate the action of the Commissioner in enforcing compulsory unitization or to defeat the rights of the other owners within the unit.

Finally, though the issue involved in this matter was one of first impression to the Louisiana Supreme Court, that Court is not alone in deciding this case against the position urged by Appellant. In a case factually similar to the present one but involving a more substantial intrusion upon property rights, the Oklahoma Supreme Court reached the same result as that represented in the opinion of the Louisiana Supreme Court in the instant case. As already discussed, the Oklahoma Supreme Court in *Texas Oil & Gas Corporation v. Rein, supra*, upheld a Corporation Commission order authorizing the drilling of a unit well on the *surface* of a tract owned by an unleased and unconsenting owner, finding that the Oklahoma statute empowers the Commission to establish the unit well at any location within the unit. The court found that the well location designation did not constitute an exercise of eminent domain, nor did it deprive the landowner of his property without due process of law. The Oklahoma statute challenged in the case is virtually identical in effect to the Louisiana statute, although not as explicit in authorizing the Commission to designate the unit well location without regard to the consent of the owners. In construing the statute and the action sought to be exercised thereunder, the court held:

> We conclude [the statute] authorizes the Commission to establish the well location at any location upon the spacing unit and that [the statute] authorizes the Commission to pool the working interests within the spacing unit and designate an operator to drill and operate the well at the designated well location.

> To hold otherwise would frustrate the intent of the Act because the owner desiring to drill would not be entitled to do so unless he held a lease covering the well location designated by the Commission.

Of course, the action upheld in the *Rein* case was the designation of the surface location of the unit well on an unleased tract owned by a non-consenting party, whereas in this case, the specific action complained of as trespass is that the Commissioner authorized the drilling of the unit well into the subsurface of the Appellant's tract. As noted, the Louisiana Supreme Court cited the *Rein* decision and agreed with the Oklahoma Supreme Court in its holding. *Nunez v. Wainoco Oil & Gas Co.*, 488 So.2d 955, 963 (La. 1986).

V.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the Supreme Court of Louisiana be affirmed, or, treating the papers as an application for a writ of certiorari, that the writ be denied.

Respectfully submitted,

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October 10, 1986

* Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date mailed three true and correct copies of the above and foregoing Motion of Appellees to Dismiss or Affirm to Mr. Adam G. Nunez, in proper person, at 1908 Maplewood Drive, Sulphur, Louisiana 70663, by depositing same in the United States Mail, postage prepaid and properly addressed. Lafayette, Louisiana, this 10th day of October, 1986.

Lawrence P. Simon, Jr.

LAWRENCE P. SIMON, JR.